

Legislative and Jurisprudential Considerations Regarding the Restriction of the Free Movement of Goods on the EU Internal Market from the Viewpoint of Public Health Protection

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ABSTRACT: In the context of a globalized economy, a functioning internal market of goods is an essential component of the current and future prosperity of the European Union. Taking into account that the harmonized legislation of the European Union has enshrined the principle of free movement of goods in concrete terms and for specific products, such as, for example, medicinal products, this article examines the restrictions and prohibitions which, even if raise barriers to free trade, they defend important objectives, such as human health. In the context of the current major global developments, the article aims to analyze how the reasons justifying the limiting of the free movement of goods, imposed by the principle of precaution for reasons of environmental and human health protection, have been used over time. In all EU policies, the concept of public health is inextricably linked to sustainable development and the effective protection of the health and life of citizens cannot be conceived without the greening of free movement of goods, more and more visible in recent years. At the same time, new innovative products and technical progress involve new challenges, and a national regulatory framework that ignores these developments may soon become an obstacle to cross-border trade.

KEYWORDS: public health, European internal market, Court of Justice of the European Union, innovative medicinal product, the principle of precaution, harmonized legislation

Introduction

The free movement of goods is one of the cornerstones of the internal market. The principle of the free movement of goods requires a common regulatory framework to ensure the unrestricted traffic of goods within the Union, in the same way as it is done within a country. This means that the basic technical standards, the product certification and the metrological definitions must comply with the rules established at European level. Regarding these rules, products can be divided into two main categories: products for which common harmonized standards have been adopted and products for which there are no harmonized standards.

Theory

From a legal perspective, the free movement of goods is one of the economic freedoms established by the Treaty on the Functioning of the European Union (TFEU). Articles 28 and 29 TFEU define the scope and content of the principle and Articles 34-37 TFEU prohibit unjustified restrictions against trade within the European Union.

Currently, the domestic market exceeds the scope of those articles of the Treaty. Harmonized legislation in several areas has defined the internal market, establishing the principle of the free movement of goods in concrete terms, for specific products. However, the fundamental function of the principle of the Treaty, of support and safety mechanism for the domestic market, remains unchanged.

Although many important restrictions to the free movement of goods have now been removed (Marin, Buzescu 2020, 728-737), the continuous flow of complaints from citizens and companies referred to the Court of Justice of the European Union points out that even the best efforts have not eliminated all barriers to trade.

Results and discussion

In the *Cassis de Dijon* judgment, the Court presented the concept of mandatory requirements as a non-exhaustive list of interests protected under Article 34 TFEU. In the same judgment, the Court stated that these mandatory requirements relate in particular to the effectiveness of fiscal supervision, the protection of public health, fair trade and consumer protection.

The mandatory requirements, as established by the Court in the *Cassis de Dijon* case, can only be invoked to justify the rules applied without distinction. Therefore, for reasons other than those provided for in Article 36 TFEU, they cannot be used in theory to justify discriminatory measures. In Case C-2/90 *Commission / Belgium*, the Court ruled that the measure that could be considered discriminatory was not discriminatory due to the special nature of the litigation, and admitted the justification concerning environmental protection.

Although environmental protection is not expressly mentioned in Article 36 TFEU, it was recognized by the Court as being a priority mandatory requirement. Thus, in Case 302/86 *Commission / Denmark*, paragraph 8, the Court held that environmental protection is one of the key Community objectives that may justify, as such, certain limitations on the free movement of goods.

In its case law, the Court of Justice of the European Union has justified many national measures for reasons of environmental protection, such as: prohibiting the importation of waste from other Member States; a deposit and return system for containers; a ban on certain chemicals, but providing for exceptions when there are no available safe substitutes (Case C-473/98 *Toolex*); ordering the electricity suppliers to purchase the entire production of electricity from renewable sources in a limited delivery area (Case C-379/98 *PreussenElektra*).

In some cases, such as, for example, Case C-67/97 *Bluhme*, the Court considered environmental protection as a component of public health and of Article 36 TFEU. Environmental protection is closely connected to the protection of human life (Rotaru 2019, 269-270) and health and, as a result of the progress of science and the high level of public information (Botină, Marin 2021, 57-66), is invoked more and more frequently by Member States.

However, even in these circumstances, the Court does not consider this reason as always enough to justify any action. Indeed, in recent years, the Court has confirmed several times that public health and environmental justifications are not always sufficient to limit the free movement of goods. In several cases, the Court upheld the Commission's arguments that the national measures were disproportionate to the aim pursued or that there was insufficient evidence of risk. (See, for example: case C-319/05 *Commission/Germany*; case C-254/05 *Commission/Belgium*; case C-297/05 *Commission/The Netherlands*; case C-432/03 *Commission/Portugal*; case C-212/03 *Commission/France*).

Member States have the obligation to prove that the justified precautionary measures can be taken on grounds of public morality, public order, public safety, protection of the health and life of humans and animals or preservation of plants. However, the prohibitions or restrictions shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Nevertheless, Member States do not have to demonstrate a clear link between evidence and risks, being sufficient to show that the area in question is marked by scientific

uncertainty. Subsequently, the EU institutions assess the case presented by the Member State according to the principle of precaution.

About consumer protection, certain barriers to trade within the EU, arising from the differences between the provisions of national legislation, must be accepted in so far as those provisions apply to domestic and imported products without distinction and may be justified by the need to meet certain priority requirements of consumer protection or fair trade. In order to be permissible, such provisions must be proportionate to the aim, which cannot be achieved by less restrictive measures against trade within the EU.

A traditional principle of the case law of the Court provides that, where imported products are similar to the internal ones, appropriate labelling that may be provided in national legislation, will be sufficient to give the consumer the necessary information on product characteristics.

Conclusions

Pursuant to Article 36 TFEU, upon the principle of the free movement of goods may be imposed certain prohibitions or restrictions on import, export or transit, justified on grounds of the protection of the health and life of humans or of the environment.

The Court of Justice ruled that the health and life of humans rank the most important place among the property or interests protected by Article 36 and the Member States shall decide, within the limits imposed by the Treaty, which is the degree of protection that will ensure, in particular how strict will be the checks that are to be undertaken (Case 104/75 *De Peijper*).

The Court also stated that the national rules or practices do not fall within the exception specified in Article 36 if the health and life of humans can be as effectively protected by measures which do not significantly restrict trade within the European Union.

The protection of the health and life of humans, animals and plants is the most common justification Member States usually use in trying to justify obstacles to the free movement of goods.

Although the case law of the Court is very extensive in this area, there are a few main rules to be followed, namely: health protection cannot be invoked if the real purpose of the measure is to protect the domestic market even if, in the absence of harmonization, the decision on the level of protection belongs to the Member State; the measures taken must be proportionate, therefore limited to what is necessary in order to achieve the legitimate objective of the protection of public health. In addition, such measures must be justified by providing evidence, data (technical, scientific, statistical, nutritional) and all other relevant information (Case C-270/02 *Commission/Italy*; Case C-319/05 *Commission/Germany*).

Under a constant case law, the Court emphasized that real risks need to be demonstrated in the light of the recent results in international scientific research.

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